THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM
THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

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Appellate Case No. 2019-000266

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Public Service Commission Docket No. 2017-292-WS

In Re: Application of Carolina Water Service, Inc. for Approval of an Increase in its Rates for Water and Sewer Services

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# INITIAL BRIEF OF RESPONDENT SOUTH CAROLINA OFFICE OF REGULATORY STAFF

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## STATEMENT OF THE CASE

The Appellant Carolina Water Service, Incorporated ("Appellant" or "CWS")[1] is appealing two orders issued by the Public Service Commission of South Carolina ("Commission"): Order No. 2018-802, dated January 25, 2019 (R. p. ___) and Order No. 2020-57 dated January 21, 2020 (collectively known as "Orders"), (R. p. ___). The issue on appeal is the Commission's decisions issued in both Orders not allowing CWS to recover, through rates charged to its customers, litigation expenses associated with its unsuccessful defense of a lawsuit presented in the United States District Court for the District of South Carolina ("District Court") captioned *Congaree Riverkeeper, Inc. v. Carolina Water Service, Inc.,* Civil Action Number 3:15-cv-00194-MBS ("Riverkeeper Action") (R. p. ___). The United States District Court granted summary judgment to the Congaree Riverkeeper, concluding CWS was liable under the Federal Clean Water Act for violating its National Pollutant Discharge Elimination System permit for over seventeen years by not connecting to the regional system and by violating the effluent discharge limitations in its DHEC issued permit twenty-three times (R. p. ___). The United States District Court initially fined CWS $1.5 million for the failure to connect to a regional wastewater treatment facility, and $23,000 for multiple unlawful effluent discharges into the Saluda River. On reconsideration, the District Court only vacated the $1.5 million fine to allow for further discovery, and denied CWS reconsideration of the Clean Water Act liability finding and the $23,000 fine (R. p. ___). The parties subsequently entered into a settlement agreement (R. p. ___).

The Commission concluded CWS should not recover the litigation expenses associated with the Riverkeeper Action, regardless of the reasonableness of the legal defense charges relative

[1] CWS changed its name to Blue Granite Water Company in 2018; however, in Docket No. 2017-292-WS the parties continue to reference to the company as CWS.

to the work performed, because the expenses were incurred in defending a lawsuit in which CWS was not the prevailing party and was found liable for violating the Clean Water Act ("CWA"). (R. p.___).

The Commission further reasoned it would be improper to impose these expenses on ratepayers when they already pay for CWS to conduct its regulated services in compliance with its state operating permits and applicable federal and state laws (R. p. ___).

## STATEMENT OF FACTS

This matter initially came before the Commission on the Application of CWS filed on November 10, 2017, whereby CWS sought approval of an increase in rates and charges for the provision of water and sewer service and the modification of certain terms and conditions related to the provision of such service (Order No. 2018-345(A), p. 1; R. pp. ___). The Application filed pursuant to S.C. Code Ann. § 58-5-240 and S.C. Code Ann. Regs. 103-512.4.A and 103-712.4.A sought a water revenue increase of $2,272,914 and a sewer revenue increase of $2,238,500 or increased revenues for combined operations of $4,511,414. (Order No. 2018-345(A), p. 1; R. pp. ___). The requested increase utilized a return on equity ("ROE") of 10.5% based on the rate of return methodology and a historical test year beginning September 1, 2016 and ending August 31, 2017. (Order No. 2018-345(A), p. 1-2; R. pp. ___).

On May 17, 2018, the Commission issued Order No. 2018-345 approving an ROE of 10.50% and additional operating revenues of $2,936,395 consisting of an increase in water revenues of $1,286,013 and an increase in sewer revenues of $1,650,382 (Order No. 2018-345(A), pp. 33-34; R. pp. ___).[2] On June 19, 2018, ORS filed a Petition for Rehearing or Reconsideration

[2] On May 30, 2018, the Commission issued an Amended Order which was assigned Order No. 2018-345(A) and is the same as Order No. 2018-345 except for a few corrections that are not relevant to the issues in this appeal.

(ORS's Pet. Rehearing and Reconsideration; R. at ___). In response to Respondent ORS's Petition for Rehearing and Reconsideration, the Commission issued Order No. 2018-494 granting a rehearing on four of the six issues raised by ORS. (Order No. 2018-494; R. pp.___). Following an evidentiary rehearing, on January 25, 2019, the Commission issued Order No. 2018-802 granting in part ORS's Petition for Rehearing and Reconsideration (Order No. 2018-802; R. p. ____). In Order No. 2018-802 the Commission discussed the witnesses' testimonies presented at rehearing on October 7, 2019 and discussed in depth its rulings on each issue argued during the rehearing (Order No. 2018-802; R. pp. ___). The Commission found that ratepayers should not be held responsible for $416,093 of litigation expenses associated with CWS's unsuccessful defense of a lawsuit in the United States District Court for the District of South Carolina captioned Congaree Riverkeeper, Inc. v. Carolina Water Service, Inc., Civil Action Number 3:15-cv-00194-MBS ("Riverkeeper Action") (*Id*., pp. 16-24; R. pp. ___).

CWS petitioned on February 14, 2019, for rehearing and reconsideration of the January 25, 2019 Order (CWS' Pet. For Rehearing and Reconsideration; R. pp. ___). ORS moved to dismiss CWS's Petition because CWS had filed a Notice of Appeal, which divested the Commission of jurisdiction over the Petition (R. pp. ___). CWS responded in opposition to the motion to dismiss and ORS replied (R. pp.___ and pp.___). The Commission granted ORS's motion to dismiss on March 7, 2019 (Order No. 2019-178; R. p.___). Subsequently, the Court dismissed CWS' Notice of Appeal as untimely, vacated the Commission order granting the motion to dismiss, and remanded the matter to the Commission to rule on the merits of the Petition (R. pp. ___). On remand, ORS responded in opposition to the Petition and CWS replied (R. pp.___ and pp. ___). On September 4, 2019, the Commission granted CWS's request for rehearing (Order No. 2019-623; R. p. ___). The parties agreed that an additional evidentiary hearing was not necessary and

suggested oral arguments be scheduled. The Commission heard oral arguments from the parties on October 7, 2019. The Commission issued Order No. 2020-57 on January 21, 2020, denying CWS's Petition for Reconsideration ("Order No. 2020-57") (R. pp. ___). This appeal followed.

In the Riverkeeper Action, the Congaree Riverkeeper sued CWS for violations of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq*., alleging that CWS violated its National Pollutant Discharge Elimination System ("NPDES") permit by failing to connect its I-20 wastewater treatment plant to the regional system and exceeding the effluent limitations for wastewater discharges into the Saluda River authorized under its NPDES permit. *Congaree Riverkeeper, Inc. v. Carolina Water Serv., Inc.*, 248 F. Supp. 3d 733, 740 (D.S.C. 2017). Bill Stangler, the Congaree Riverkeeper, testified that he had brought the action in federal court to bring CWS' I-20 facility into compliance with its NPDES permit. (Rehearing Tr. p. 265, ll. 7 – 20, R. pp. ___). That permit, which had a January 1, 1995 effective date, required the I-20 plant to connect to a regional wastewater treatment system and cease discharging into the Lower Saluda River. *Id.* Yet years later, unpermitted discharges from the I-20 plant into the Saluda continued, and there were numerous effluent discharges in excess of its state issued NPDES permit from the I-20 facility. *Id.* Mr. Stangler testified that the Riverkeeper Action sought to address both the connection to a regional treatment system and the numerous effluent limitation violations. (Rehearing Tr. p. 265, ll. 7 – 20, p. 266 l. 15 – p. 267, l. 14, R. p. ___).

By Order entered March 30, 2017, United States District Judge Margaret B. Seymour granted summary judgment to Congaree Riverkeeper, concluding that CWS violated its NPDES permit for over seventeen years by not connecting to the regional system and by violating the discharge limitations in its permit twenty-three times. 248 F. Supp. 3d at 755-56; (Ex. R-18, R. p. ____; Rehearing Tr. p. 278, ll. 1-5, R. p. ____). The District Court initially ordered a

$1,500,000 fine for the failure to connect and a $23,000 fine for the effluent limit violations and directed both fines be paid to the United States Treasury. 248 F. Supp. 3d at 756. The District Court also permanently enjoined CWS from discharging any treated or untreated waste water into the Saluda River and ordered CWS to connect to the regional waste water treatment plant in accordance with The 208 Water Quality Management Plan for the Central Midlands Region ("208 Plan"). *Id*. at 757.

In her March 30, 2017 Order, Judge Seymour discussed extensively the history of negotiations among CWS, the Town of Lexington, and the South Carolina Department of Health and Environmental Control ("SCDHEC") regarding interconnection of the I-20 facility with the regional system. *Id*. at 740-45. She also reviewed and discussed the interconnection agreement between CWS and the Town of Lexington for which the Commission denied approval in 2003 because CWS had agreed to pay too high a rate for the service received, which would have resulted in its customers effectively subsidizing the regional system. *Id*. at 742-43; *see also In re Application of Carolina Water Service, Inc.*, Docket No. 2002-147-S, Order No. 2003-10, 2003 WL 26623818 (S.C. Pub. Serv. Comm'n 2003). She reasoned the NPDES permit placed the onus on CWS to engage in negotiations that would allow CWS to submit a satisfactory agreement for the Commission's approval. 248 F. Supp. 3d at 747. CWS had the obligation to contract with the Town of Lexington or take other measures and steps to fulfill the permit interconnection requirements. *Id*. Based upon the evidence presented, she concluded CWS failed to undertake any meaningful attempt to comply with the NPDES permit during the period between 2002 and 2014 and did not engage in negotiations with the Town of Lexington after the Commission denied approval of the interconnection agreement in 2003 until 2014, following Congaree Riverkeeper

serving its notice of intent to sue under the CWA.[3] *Id*. at 743, 755. The District Court stated that "[w]hile regional connection does require other actors' assistance and approval, [CWS] cannot be rewarded for its lack of a good faith effort to engage in negotiations and receive the required approvals." *Id*. at 747.

While CWS, both before the District Court and the Commission, attempted to blame the Town of Lexington for its failure to interconnect, the District Court ultimately rejected CWS's contention and its interpretation of the meaning of the language in its 1995 NPDES Permit. *Id*.at 752-55. The District Court concluded CWS "was required to physically connect to the regional system, in any manner possible, when [the regional system] became physically available in 1999." *Id.* at 755. The District Court then noted that the CWA is a strict liability statute. "Accordingly, the 'reasonableness or bona fides of an alleged violator's efforts to comply with its permit is not relevant in determining whether a violator is liable under the [CWA].'" *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 890 F. Supp. 470, 496 (D.S.C. 1995)). In concluding a $1,500,000 fine was appropriate, the District Court reasoned:

> The court first considers the seriousness of the violation. The court finds that the sewage discharge is a serious violation. Next, the court calculated the economic benefit Defendant made on the I–20 Plant between 2009 and 2013, which averaged $689,000 per year. Third, Defendant has violated its permit for over seventeen years; however, only recently have any person or group undertaken an enforcement action. The last enforcement action ended in 2002. In 1998, Defendant initially attempted to comply with the permit; however, Defendant failed to undertake any attempt to comply with the permit between 2002 and 2014. Lastly, Defendant will

[3] CWS argued there were a few communications with the Town of Lexington between 2002 and 2014 related to interconnection. The Commission reviewed and considered the communications which were made part of the record in this proceeding in reaching its decision. (Order No. 2020-57, p.3 n.2., R. p.___) It is not clear whether the communications were part of the record before Judge Seymour, but the Commission concluded it was unlikely they would have altered her decision, as the Clean Water Act is a strict liability statute. *Id.* Accordingly, "the reasonableness or bona fides of an alleged violator's efforts to comply with its permit is not relevant in determining whether a violator is liable under the Act." *Id.* (quoting *Friends of the Earth, Inc*. v. *Laidlaw Envtl. Servs. (TOC)*, *Inc*., 890 F. Supp. 470, 496 (D.S.C. 1995)).

> need to undertake costs to correct the problems caused by its failure to fulfill the permit requirements.

*Id*. In concluding a $23,000 fine was appropriate for the effluent limit violations, the District Court ruled there was no genuine issue of material fact on CWS's claimed defense. *Id.* at 755-56.

In a subsequent Order dated March 26, 2018, Judge Seymour denied in part and granted in part CWS' motion for reconsideration, granted the Congaree Riverkeeper's motion for attorney fees as the prevailing party, and denied CWS' motions to substitute the Town of Lexington as a party or join the Town of Lexington as a necessary party. By the time of the March 26, 2018 Order, the Town of Lexington had exercised eminent domain to acquire the I-20 wastewater treatment facility. Judge Seymour declined to reconsider her ruling that CWS violated the CWA when it failed to connect to the regional system and by exceeding effluent limitations (Rehearing Tr. p. 278 l. 6 – p. 279 l. 2, R. p. ____). The District Court also declined to vacate the $23,000 fine ordered for the twenty-three effluent limit violations (Rehearing Tr. p. 279, ll. 3-10, R. p. _____). The District Court vacated the $1,500,000 fine to allow discovery and argument by the parties on the appropriate fine amount for CWS' failure to connect. (Rehearing Tr. p. 278, ll.6 – p. 279, l. 2, R. p. ____). The District Court authorized an award of attorney fees and litigation costs to Congaree Riverkeeper under 33 U.S.C. § 1365 and Federal Rule of Civil Procedure 54(d) but did not assess the specific amount of attorney fees. Section 1365 is part of the CWA and provides that a court "may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." 33 U.S.C. § 1365(d) (emphasis added).

In Order No. 2018-802, issued January 25, 2019, ruling on ORS's Petition for Rehearing and Reconsideration, the Commission stated it agreed with ORS Witness Dawn M. Hipp's

statement, that "[r]ate payers should not bear the burden of legal costs related to CWS's failure to operate its I-20 sewer system in accordance with its NPDES permit. These costs should be the responsibility of CWS's shareholders, otherwise no incentive exists for regulated utilities to operate in compliance with federal, state, and local laws." (Rehearing Transcript page 412, lines 12-18. R. p. ____; Order No. 2018-802, p. ___. R. p. _____). Further support for the Commission finding is provided by Commission Regulations, which require water and sewer utilities to "comply with all laws and regulations of State and local agencies pertaining to sewerage service." S.C. Code Ann. Regs. 103-570(A), 103-770(A). (Order No. 2018-802, p. ___. R. p. _____). The Commission also relied, in part, on the North Carolina Supreme Court's decision in *State ex. rel. Utilities Commission v. Public Staff North Carolina Utilities Commission*, 343 S.E.2d 898 (N.C. 1986) and reasoned as follows in determining that CWS should not recover litigation expenses associated with the Riverkeeper Action:

> As a public utility operating under the laws of South Carolina and pursuant to its federally granted NPDES permit, CWS was required to operate its facilities in compliance with federal, state, and local laws. In its orders, the federal court found significant violations by CWS. While the Riverkeeper case is still ongoing as to the penalty to be imposed, the order of the federal court found CWS to be in violation of its permit. We believe it would be improper to impose these expenses upon the ratepayers when the ratepayers were already paying for the Company to provide its services in compliance with its permits and with applicable federal and state laws, and, accordingly, were not deriving any benefit from the expenditure.

(Order No. 2018-802, p.19. R. p. _____).

After the federal court's March 26, 2018 Order, CWS, with Congaree Riverkeeper's consent, moved for the appointment of a United States Magistrate Judge to mediate the Riverkeeper Action. The District Court granted the motion. The parties mediated the case, reached a settlement, and requested the Court enter a consent order approving the settlement and entering final judgment. (Suppl. Mem. Supp. Pet. Rehearing or Reconsideration, Ex. 1 (Filed May

21, 2019). R. p. ____). The District Court issued the requested order on March 11, 2019. *Id*. The order incorporated the terms of the parties' Settlement Agreement. *Id*. Under the monetary terms of the Settlement Agreement, CWS agreed to pay $385,000 of attorney fees to Congaree Riverkeeper's legal counsel; donate $350,000 to the Central Midlands Council of Governments to support implementation of its Section 208 Water Quality Management Plan and water quality monitoring initiatives of the Midlands Rivers Coalition; and pay $23,000 to the United States Treasury in full satisfaction of any obligation owed by CWS resulting from the operation of the I-20 facility. (Suppl. Mem. Supp. Pet. Rehearing or Reconsideration, Ex. 2, section II, R. p. ____). CWS did not seek to recover from its customers the $758,000 it agreed to pay under the Settlement Agreement. The Settlement Agreement terms included that CWS admitted to no violation of the CWA and the Settlement Agreement was not intended to be an admission of any liability or wrongdoing. (Suppl. Mem. Supp. Pet. Rehearing or Reconsideration, Ex. 2, section V.A.; R. p. ___). The Settlement Agreement also provided CWS the right to use the Agreement in any proceeding to establish that the Riverkeeper Action ended "after the Court's finding of liability but before the resolution of penalties and attorneys' fees, except that CWS or its agents and/or owners may not use th[e] Agreement to seek vacatur of the Court's March 30, 2017 summary judgment order or of any other final order issued by th[e] Court." *Id*.

In Order No. 2020-57 issued January 21, 2020, following the Settlement Agreement between CWS and Congaree Riverkeeper and District Court approval of the same, the Commission concluded that CWS "should not recover from its customers the legal expenses associated with the Riverkeeper Action, regardless of the reasonableness of the charges relative to the work performed, because they were incurred in defending a lawsuit in which CWS was not the prevailing party and was found liable by the United States District Court for the District of

South Carolina for violating the Clean Water Act." (Order No. 2020-57, p. 12; R. p._____). The Commission reasoned that the District Court's orders in the Riverkeeper Action remained operative and provided important guidance. (Order No. 2020-57, p. 9; R. p._____). Further, the Settlement Agreement between CWS and Congaree Riverkeeper provided that CWS could not use the Settlement Agreement to seek vacatur of the District Court's March 30, 2017, summary judgment order. *Id.* No arguments or evidence was presented to the Commission that would rise to the level of leading the Commission to reach a conclusion contrary to the one reached by the United States District Court that CWS violated the CWA. *Id*. The Commission noted that the District Court considered the arguments and evidence CWS presented regarding the difficulties CWS encountered in negotiating with the Town of Lexington and DHEC regarding connection of the I-20 treatment facility to the regional system. *Id.*

The Commission concluded CWS had not demonstrated the defense and resolution of the Riverkeeper Action conferred a substantial benefit on customers, as it had argued. (Order No. 2020-57, p. 11; R. p._____). The Commission also rejected CWS's argument it had conferred a substantial benefit on its customers by preventing the I-20 system from being shut down by the Court in the Riverkeeper Action without a plan in place for customers served by the system. *Id*.

The Commission reasoned CWS was being paid by its customers to comply with its NPDES permit and find a way to connect with the regional system as required under its NPDES permit, not create an emergency where the I-20 facility was forced to stop operating without alternative arrangements for its customers having been made. (Order No. 2020-57, p. 11-12; R. p._____). In addition, the Congaree Riverkeeper, Bill Stangler, testified at the evidentiary hearing on ORS's Petition for Reconsideration that he was not seeking a termination of sewer services to customers served by the I-20 system and that the District Court allowed CWS a year to obtain a

resolution to avoid that type of termination. (Rehearing Transcript, pp. 267 ll. 15-21, 277 ll. 3-7, 337, l. 18 -338 l. 12; R. pp. _____; Order No. 2020-57, p. 12; R. p._____).

## STANDARD OF REVIEW

The standard of judicial review for orders of the Commission is governed by the Administrative Procedures Act ("APA"). South Carolina Code Ann. § 1-23-380(A)(5) provides that:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
> a) in violation of constitutional or statutory provisions;
> b) in excess of the statutory authority of the agency;
> c) made upon unlawful procedure;
> d) affected by other error of law;
> e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

This standard of review has been affirmed by this Court as applied to decisions of the Commission. "We will not substitute our judgement for that of the PSC where there is room for a difference of intelligent opinion." *Utilities Serv. of S.C. Inc. v. S.C. Office of Regulatory Staff,* 392 S.C. 96, 103, 708 S.E.2d 755, 759 (2011) (citing *Kiawah Prop Owners Group v. Pub. Serv. Comm'n of S.C.*, 357 S.C. 232, 237, 593 S.E.2d 148, 151 (2004)). The Court "employs a deferential standard of review when reviewing a decision of the Public Service Commission. If there is substantial evidence to support a decision by the PSC, the Court will affirm the decision." *Heater of Seabrook, Inc. v. Pub. Serv. Comm'n of S.C.,* 324 S.C. 56, 60, 478 S.E.2d 826, 828 (1996). Because the Commission is an expert in utility rates, "the role of a court reviewing such decisions is very limited." *Hamm v. S.C. Pub. Serv. Comm'n .,* 289 S.C. 22, 25, 344 S.E.2d 600,

601 (1986) (quoting *Patton v. S.C. Pub. Serv. Comm'n .,* 280 S.C. 288, 291, 312 S.E.2d 257, 259 (1984)).

Furthermore, the burden of proof in the present appeal is on the Appellant CWS. This Court has previously held that "because the Commission's findings are presumptively correct, the party challenging the Commission's order bears the burden of convincingly proving the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence of the record as a whole." *S.C. Energy Users Comm. v. S.C. Pub. Serv Comm'n,* 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010) (citing *Duke Power Co v. Pub. Serv. Comm'n of S.C.,* 343 S.C. 554, 558, 541 S.E.2d 250, 252 (2001)).

Pursuant to S.C. Code Ann. § 58-5-330, a party may apply to the Commission for a rehearing in respect to any matter determined in the proceeding. "No right of appeal accrues, to vacate or set aside either in whole or in part, an order of the commission…unless a petition to the commission for a rehearing is filed and refused…" *In re: Application of South Carolina Electric & Gas Company for Increases and Adjustments in Electric Rate Schedules and Tariffs and Request for Mid-Period Reduction in Base Rates for Fuel,* Order No. 2013-41, Docket No. 2012-218-E (Pub. Serv. Comm'n of S.C. Feb. 7, 2013). The Commission reexamined the merits of the findings and conclusions contained in its initial Order and concluded that based on its reexamination of the facts, that CWS' customers should not be required to pay the Appellant's litigation expenses and costs related to its violation of the federal Clean Water Act, 33 U.S.C. §§1251 *et seq*.

Since the Commission findings are presumptively correct, the party challenging a Commission order bears the burden of convincingly proving that the Commission decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence on the whole record. *Kiawah Prop. Owners Group,* 357, S.C. at 593, S.E.2d at 151. It

is clear from the evidence presented at the rehearing of this case that the Commission committed no error in ruling that the legal costs incurred by CWS in its unsuccessful effort to defend the *Riverkeeper* lawsuit were not necessary for CWS' provision of service and did not secure anything new or tangible for its customers that CWS did not already owe them under the law.

## SUMMARY OF ARGUMENT

The Commission's decision to deny CWS's recovery of expenses incurred in defending the Riverkeeper Action was proper and not erroneous, nor an abuse of discretion, arbitrary, or capricious. Complying with state and federal laws is inherently part of a utility providing minimally adequate service. Commission Regulations require water and sewer utilities to "comply with all laws and regulations of State and local agencies pertaining to sewerage service." S.C. Code Ann. Regs. 103-570(A), 103-770(A). Ratepayers pay CWS to provide its services in compliance with its permits and with applicable federal and state laws, including compliance with effluent limitations for discharges into the Saluda River allowed under its NPDES permit and connecting its I-20 wastewater treatment plant to the regional system as required by its permit. Consequently, the legal fees at issue were not an expense associated with the task of providing water to its customers but rather were incurred as a result the utility's failure to comply with applicable federal and state law.

## ARGUMENT

### I. The Commission Properly Denied CWS's Request to Recover from Its Customers Legal Costs that Were Incurred in Its Failed Effort to Defend Itself in Federal Court from a Lawsuit Based on Its Numerous Violations of Federal Environmental Laws and the Terms of Its State Issued NPDES Permit.

In denying CWS's request to recover from its customer the litigation expenses associated with defending the Riverkeeper Action, the Commission relied, in part, upon the North Carolina

Supreme Court's decision in *State ex. rel. Utilities Commission v. Public Staff, North Carolina Utilities Commission,* 343 S.E.2d 898 (1986). In that case, a $13,000 penalty was imposed on a utility for the utility's "failure to notify the Division of Health Services of maximum microbiological contaminant level violations and for its failure to notify affected customers of these violations." *Id*. at 905. The utility did not contest the assessment of the penalty but only disputed the reasonableness of the amount and sought recovery from its customers of $1,938 in legal fees spent in challenging the amount of the penalty. The North Carolina Utilities Commission concluded that the legal expense the utility incurred in "good faith defense of the penalty assessment" was a "reasonable and necessary expenditure." *Id*. at 906. The North Carolina Supreme Court held that this conclusion was an error of law in that the legal fees were not an expense associated with the task of providing water to its customers but rather were incurred as a result of the utility's "failure to provide adequate water service." *Id*. at 907. In addition, because the legal fees "could have been avoided had [the utility] initially carried out its responsibility of providing adequate water service to its subdivisions, this expense cannot properly be considered reasonable or necessary." *Id*.

*State ex. rel. Utilities Commission v. Public Staff, North Carolina Utilities Commission* is both consistent with and supports the Commission's decision. Despite its repeated violations of the CWA, CWS would have this Court believe it is entitled to pass the resultant costs for its failure onto its customers. CWS wants this Court and the Commission to reach a conclusion like the North Carolina Utilities Commission did that CWS' legal expenses were incurred in a good faith defense of the Riverkeeper Action and were thus reasonable and necessary and recoverable from customers. This Court should reject that reasoning and affirm the Commission's analysis, which is consistent with the North Carolina Supreme Court's reasoning. CWS should not be permitted

recovery from its customers the legal expenses associated with the Riverkeeper Action, regardless of the reasonableness of the charges relative to the work performed, because they were incurred in defending a lawsuit in which CWS was not the prevailing party and was found liable by the United States District Court for the District of South Carolina for violating the Clean Water Act. Ongoing operating compliance with state and federal laws is required of regulated utilities to provide minimally adequate service. Commission Regulations require water and sewer utilities to "comply with all laws and regulations of State and local agencies pertaining to sewerage service." S.C. Code Ann. Regs. 103-570(A), 103-770(A). Ratepayers pay CWS to provide its services in compliance with its permits and with applicable federal and state laws, including not exceeding the effluent limitations for discharges into the Saluda River under its NPDES permit and connecting its I-20 wastewater treatment plant to the regional system as required by its permit. Consequently, the legal fees at issue were not an expense associated with the task of providing water or wastewater service to its customers but were incurred as a result of CWS's failure to comply with applicable federal and state law. If CWS's operating conduct and standards had been compliant with its legal and regulatory obligation to conduct its business in compliance with the terms of its NPDES permit, there would have been no lawsuit to defend or legal defense fees incurred. *See State ex. rel. Utilities Comm'n,* 343 S.E.2d at 907.

In addition, the Commission provided a well-reasoned and correct analysis distinguishing the cases CWS relied upon in its Petition for Reconsideration: the South Carolina Supreme Court's decision in *City of Columbia v. Board of Health and Environmental Control*, 292 S.C. 199, 355 S.E.2d 536 (1987) and the South Carolina Court of Appeals' decision in *Midlands Utility, Inc. v. S.C. Department of Health and Environmental Control*, 313 S.C. 210, 437 S.E.2d 120 (Ct. App. 1993). Neither case is referenced or discussed in the United States District Court's orders in the

Riverkeeper Action, and it is unclear whether they were presented to Judge Seymour. In *City of Columbia* this Court simply held that the City was subject to regulation by DHEC, which, therefore, could order the City to acquire, by condemnation or negotiation, two private sewer systems owned by Midlands Utility ("Midlands"). *City of Columbia* did not involve violations of the CWA.

In *Midlands Utility*, the Court of Appeals reversed fines, issued under a state statute associated with effluent discharge violations at the Washington Heights and Lincolnshire wastewater treatment systems, which occurred while the City of Columbia was unsuccessfully appealing an order to connect or purchase the two systems. *Midlands Utility*, 313 S.C. at 212-13, 437 S.E.2d at 121. DHEC conceded it was impossible for the Washington Heights and Lincolnshire systems to have met the pollution standards regardless of how well Midlands Utility managed them, unless they were connected to the City of Columbia or extensively upgraded. *Id.* 313 S.C. at 213, 437 S.E.2d at 121. The Court of Appeals concluded fines should not have been issued for the discharge violations at the two systems because the City of Columbia was the primary cause of the continued discharges. *Id.* CWS can point to no similar concession or finding of impossibility in this case. It also notable that, in *Midlands Utility*, Midlands argued fines associated with another system, the Vanarsdale system, were unwarranted where DHEC had denied its request to connect to the City of Cayce's system because granting a permit conflicted with the regional sewerage plan. *Id.* at 213, 437 S.E.2d at 121. The Court of Appeals held there was no abuse of discretion in imposing a penalty for the Vanarsdale system violations, which Midlands Utility did not contest had occurred. *Id.*

Notably, the record before the United States District Court in the Riverkeeper Action included the negotiations among CWS, Town of Lexington, and DHEC regarding the I-20 system.

The Commission properly concluded that nothing presented to it supported a finding that the District Court's conclusion that CWS violated the Clean Water Act was incorrect. The Commission also correctly concluded that "[n]either *City of Columbia* nor *Midlands Utility* dictates that the operator of a regional wastewater system is solely responsible when an NPDES permit holder, such as CWS, fails to connect with the regional system in compliance with its permit and that the NPDES permit holder cannot be liable for violating the Federal Clean Water Act." (Order No. 2020-57, pp. 10-11; R. p._____). The Commission's decision is not "clearly erroneous, or arbitrary or capricious, or an abuse of discretion." *S.C. Energy Users Comm.* 388 S.C. at 491, 697 S.E.2d at 590 (citing *Duke Power Co*., 343 S.C. 554, 558, 541 S.E.2d 250, 252 (2001)).

**II. The Commission Acted within Its Allowable Discretion in Ruling That, Based on the Evidence in the Hearing Record, CWS's Customers Should Not Be Responsible for the Legal Expenses CWS Incurred in Its Attempt to Defend the Riverkeeper Environmental Litigation when the Federal Court Granted the Plaintiff Summary Judgement for Violations of the Clean Water Act and Its State Issued Operating Permit.**

In the rehearing before the Commission, ORS objected to the Commission having initially allowed CWS to recover its litigation expenses related to the Riverkeeper Action on the basis that these cases stemmed from CWS' failure to provide service in compliance with its NPDES permit and state and federal law (Rehearing Tr. p. 369, ll. 5 - p. 370, l.15. p. 412, ll. 12-18, R. p.____). CWS was found by the United States District Court to have repeatedly violated the CWA and was fined by that Court for those multiple violations. *Id.* ORS witness Hipp testified at the rehearing that ORS's position related to these litigation expenses rested on the policy that ratepayers should not bear the burden of legal costs related to the Company's failure to operate its I-20 sewer system in accordance with its NPDES permit (Rehearing Tr. p. 382, l. 19 – p. 383, l. 2, R. p. ___) ORS did not challenge the reasonableness of the fees, the hourly rates, or the hours spent by CWS' attorneys on the litigation (Rehearing Tr. p. 473, ll. 10-13, R. p.___). ORS, however, did challenge

the Commission's Order to the extent it required CWS customers to pay the legal defense cost to the Company for litigating the Riverkeeper Action because those expenses are not related to or necessary for the provision of adequate sewer service to its customers. Rather, they are the result of CWS' failure to manage its I-20 system appropriately, as shown by the fact it was found liable and fined by a United States District Judge for numerous violations of the CWA. (Rehearing Tr. p. 387, ll. 13 – 15, R. p.____). These federal court findings regarding CWS' violations of the CWA are detailed above. (Rehearing Tr. p. 413, l. 15 – p. 414, l. 16, R. p.____). The United States District Court's findings were appropriately relied on by the Commission in its Order on Rehearing, Order No. 2018-802, finding that the Company was not entitled to pass its legal costs defending the Riverkeeper Action to its customers.

Mr. Stangler, testified before the Commission on behalf of the Riverkeeper that CWS's pattern of ongoing effluent discharge violations was one of the issues that brought the CWS I-20 facility to the Congaree Riverkeeper's attention and was a key factor in deciding to file the lawsuit. (Rehearing Tr. p. 265, l. 21 – p. 266, l. 21, R. p. ____). The legal expenses at issue were incurred in defending a lawsuit in which CWS was found liable for violating the CWA not only due to its failure to connect to the regional system but also because it exceeded the effluent limitations in its permit twenty-three times. *Congaree Riverkeeper*, 248 F. Supp. 3d at 755-56.

CWS's claim that its defense of the Riverkeeper Litigation was an unavoidable and core function of its responsibilities as a public utility is both misplaced and illogical. It is clearly not a core operating function of any regulated water or sewer utility to violate federal law in its operations and then demand its customers pay for the legal defense costs incurred while attempting to defend and excuse those ongoing operating violations. CWS lost its case when the United States District Court granted summary judgment to the Congaree Riverkeeper and found CWS liable for

violating the CWA. In addition, the United States District Court carefully considered a motion for reconsideration filed by CWS. The Court did not vacate its liability ruling against CWS or the fine set by the Court for CWS's effluent discharge violations and also awarded attorney fees and litigation costs to Congaree Riverkeeper under a statute only allowing for such recovery by a prevailing or substantially prevailing party. CWS expressly agreed, as part of the terms of the Settlement Agreement with Congaree Riverkeeper, not to seek vacatur of the United States District Court's orders and paid $385,000 in attorney fees to Congaree Riverkeeper's legal counsel and $23,000 to the United States Treasury.

CWS states in its brief that its intent is not "to persuade this Court to address the question of whether Judge Seymour was correct in her ruling" and agrees "[t]hat is not an issue for this appeal." Appellant's Initial Brief, p. 13. CWS then argues the Commission was clearly erroneous as a matter of law because "the circumstances in place from 2004 until Judge Seymour's ruling show that CWS not only was reasonable in defending the Riverkeeper Litigation but was obligated to defend the Riverkeeper Litigation." Appellant's Initial Brief, p. 14. CWS' focus on whether it was reasonable or obligated to defend the Riverkeeper Action is both misplaced and ultimately irrelevant to the federal law violations of the Clean Water Act established in the Summary Judgement ruling by the federal district court.

The Commission was correct in ruling that it is not necessary to decide whether CWS acted reasonably and its attorneys charged reasonable fees in their defense of the Riverkeeper Action. Commission Regulations required, and customers already were paying, CWS to provide its regulated services in compliance with applicable federal and state law. The United States District Court concluded that CWS failed to meet this state required operating standard. The present case and appeal is not a contested proceeding where there has been a settlement and some uncertainty

as to liability remains unresolved. There is no uncertainty as to CWS liability and CWS agrees the question of whether the United States District Court was correct in its summary judgment ruling is not an issue in this appeal.

CWS argues in its brief that the litigation expenses should be recoverable from customers because its operation of the I-20 facility until it could be interconnected with the regional system "was absolutely integral to CWS' ability to meet its obligation to serve its customers" and that CWS was obligated to defend any legal action that threatened its ability to operate the I-20 facility. The Commission considered and correctly declined to follow this rationale. CWS was being paid by its customers to comply with its NPDES permit and find a way to connect with the regional system as required under that permit, not create an emergency where the I-20 facility was forced to stop operating without alternative arrangements for its customers having been made (Order No. 2020-57, p. 12. R. p. ___). In addition, Mr. Stangler testified that the Riverkeeper was not seeking a termination of sewer service to customers served by the I-20 system and that the District Court allowed CWS a year to obtain a resolution. (Rehearing Transcript, pp. 267 ll. 15-21, 277 ll. 3-7, 337 l. 18 - 338 l. 12; R**.** pp. _____). Furthermore, the United States District Court's March 29, 2017, order directed CWS to stop discharging any treated or untreated wastewater into the Saluda River *and* "connect to a regional wastewater treatment plant, in any manner, in accordance with the 208 Plan." *Congaree Riverkeeper*, 248 F. Supp. 3d at 755-56. There was no attempt to create a public health emergency whereby the customers formerly served by the I-20 plant would be without sewer service. Rather, the Riverkeeper Action was brought to stop the discharges into the Saluda River *and* compel CWS to connect with the regional system, which the District Court found CWS failed to connect in violation of its NPDES Permit for over seventeen years. *Congaree Riverkeeper*, 248 F. Supp. 3d at 755-56.

Moreover, CWS was not, as it attempts to imply, sued by the Riverkeeper for the sole reason that it had failed to interconnect to the Town of Lexington. CWS attempts to have the Court ignore that it was also was sued by the Riverkeeper because of the numerous times CWS violated the terms of its NPDES permit by exceeding the amount the I-20 plant may discharge into the Saluda River under its NPDES permit. In concluding a $23,000 fine was appropriate for the repeated CWS effluent limit violations, the District Court found that there was no genuine issue of material fact on CWS' "upset defense." *Id*. at 755-56. The Settlement Agreement included CWS paying this $23,000 to the United States Treasury.

In testimony before the Commission CWS's Operations and Regulatory Affairs Manager, Michael R. Cartin, stated that, "regulatory utilities, like any business, will experience litigation cost associated with its business operations." (Original Tr. p. 317, ll. 4-5; R**.** p. ____). Mr. Cartin further stated that "CWS agrees that penalties are not recoverable, it disagrees with ORS that the cost of 'settlements' are not recoverable. Settlements limit litigation costs and liability which benefits the utility and its ratepayers and recovery of litigation expenses is in the public interest." (Original Tr. p. 317, ll. 12-13; R. p**.** ____). While, as a general rule, this may be true, in this situation, because CWS only entered into a Settlement Agreement subsequent to being found liable for its repeated and multiple violations of the CWA, CWS seeks to recover moneys from its customers simply by placarding a more palatable name over "penalty." Accordingly, CWS seeks this Court to give it permission to conduct an improper end-around where it has been found to violate the CWA.

That CWS agrees penalties are not recoverable is inconsistent with the fact it is now seeking to recover from its customers legal costs incurred in defending a lawsuit in which there is a federal court order finding CWS liable for and assessing a fine against CWS for violating the

CWA. Under the express terms of that settlement agreement, CWS cannot seek vacatur or attempt to alter that Order. Ratepayers should not pay for the CWS's legal defense expenses associated with its litigation of case where a United States District Court found that the Company regulated operations had directly violated state and federal laws.

When a party presents its evidence to the Commission, the Commission has a duty to carefully review the record and fully document its findings of facts, and base its decision on reliable, probative, and substantial evidence on the whole record. *Kiawah Property Owners Group*, 357 S.C. 232 at 237, 593 S.E.2d 148 at 151. "Substantial evidence is not a mere scintilla of evidence nor evidence viewed blindly from one side, but is evidence which, when considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency reached." *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n,* 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984).

It is the responsibility of the Commission to "balance the respective interests of the company and the consumers." *Seabrook Island Property Owners Ass'n, v. S.C. Pub' Ser. Comm'n, 303 S.C. 493, 498,* 401 S.E.2d 672, 675 (1991). With regards to CWS' expenses incurred in defending the Riverkeeper Action, the Commission had a duty to take the interest of the CWS' customers into consideration. The United States District Court granted summary judgment to the Riverkeeper, concluding that Appellant CWS violated its NPDES permit for over seventeen years by not connecting to the regional system and by violating the discharge limitations in its permit twenty-three times. *Congaree Riverkeeper,* 248 F. Supp. 3d 733, 755-56. If the Commission had authorized CWS to recover its legal defense litigation costs, then the Commission would have provided all public utilities in this state a blank check to violate state and federal environmental laws, and then deny and contest in court all charges, violations, or lawsuits brought against the utility using customers funds. Fines imposed on a wastewater utility for illegal discharge are not

recoverable from its ratepayers, therefore, it is confounding that CWS is seeking recovery for its litigation expenses for defending its illegal discharges.

## III. The Commission Acted within Its Allowable Discretion in Finding That CWS's Customers Should Not Be Responsible for the Expenses CWS Incurred in Defending the Riverkeeper Action.

It is well established that a utility is not entitled to recover through rates the cost of fines or penalties that it incurs for violations of the law. Contrary to the Appellant's claim, there is no language in either the *Hope* or *Bluefield* decisions to support their broad allegation that the company is entitled to recovery of legal expenses incurred as a result of the defense of the Riverkeeper Action, as the United States Supreme Court did not set a standard in those cases to be applied by state commissions to determine whether utilities are entitled to recovery of such expenses. *See Bluefield Waterworks v. Public Service Commission of West Virginia*, 262 U.S. 679 (1923); *Federal Power Commission v. Hope Natural Gas Co*., 320 U.S. 591 (1944). These cases only stand for the rule that a utility is entitled to the opportunity to earn a reasonable return. CWS was granted the opportunity to earn a very generous 10.50% return on equity.

"In the traditional cost of service approach to ratemaking, it has been generally assumed that utilities have a right to charge rates that will provide a reasonable opportunity to recover costs prudently incurred in the process of providing utility services." *Accounting for Public Utilities*, Matthew Bender & Company, §7.01, p. 7-1 (Nov. 2019). Additionally, "a utility should not delay recognition of a probable and estimable liability for environmental costs *until a regulator determines whether the cost is an allowable cost for ratemaking purposes*." *Id.* §12.07[6], p. 12-50 (emphasis added). The accounting rules under which public utilities operate thus do not automatically allow for the recovery of environmental costs in rates but rather utility regulators make the determination regarding the inclusion of a specific expense in customers rates. The

standard under which regulators should make this determination is whether the expense was prudently incurred "in the process of providing utility services." *Id.*

The Commission is granted its authority from the Legislature and "has wide latitude to determine its methodology in rate-setting and there is no abuse of discretion where substantial evidence supports the finding of a just and reasonable rate." *Porter v. S.C. Pub. Serv. Comm'n*, 328 S.C. 222, 233493 S.E.2d 92, 98 (1997) (citing *Heater of Seabrook v. Pub. Serv. Comm'n of S.C.*, 324 S.C. 56, 478 S.E.2d 826 (1996)). This Court has additionally held that "[t]he PSC's findings are presumptively correct, requiring the party challenging an order to show the decision is 'clearly erroneous in view of the substantial evidence on the whole record.'" *Kiawah Property Owners Group* 357 S.C. at 237, 593 S.E.2d at 151 (citing *Total Envtl. Solutions, Inc. v. S.C.Pub. Serv. Comm'n*, 351 S.C. 175, 568 S.E.2d 365 (2002); *Heater of Seabrook, Inc. v. Pub. Serv. Comm'n of S.C.*, 324 S.C. 56, 478 S.E.2d 826 (1996)).

There is nothing in the record of this case which supports a claim that the Commission in any way abused its discretion. Appellant's only arguments at rehearing and on appeal are that the attorney's fees and cost were a reasonable amount or that CWS did not violate its NPDES in its failure to connect to the regional system because the Town of Lexington prevented it from doing so. The United States District Court ultimately rejected that argument. CWS agrees the question of whether the District Court was correct "is not an issue for this appeal." Appellant's Initial Brief, p. 13.

CWS has asked that this Court allow it to collect from customers the expenses of unsuccessfully defending the Riverkeeper Action by both substituting its judgment for that of the Commission and disregarding the rulings of the United States District Court. However, "the Court may not substitute its judgment for the Commission's on questions about which there is room for

a difference of intelligent opinion." *Duke Power Co. v. Pub. Serv. Comm'n of S.C.*, 343 S.C. 554, 558, 541 S.E.2d 250, 252 (2001). "Because the Commission's findings are presumptively correct, the party challenging a Commission order bears the burden of convincingly proving the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence on the whole record." *Id*. CWS has failed to carry that burden here. The Commission's orders provided a clear and reasonable basis for the Commission's decision that the Riverkeeper Action legal expenses should not be forced on to its customers.

Costs or expenses of a utility are not recoverable simply because they are incurred by a utility. Once any such expenses are challenged, as they were here by ORS, it is the utility's burden to prove to the regulator that the costs were prudently incurred to provide utility services. See, *Accounting for Public Utilities*, §7.01, p. 7-1; *Hamm v. Pub. Serv. Comm'n of S.C.*, 309 S.C. 282, 286-87, 422 S.E.2d 110, 112-13 (1992).

**IV. The Commission's Decision Regarding Litigation Expenses in Connection with the Riverkeeper Action Is Not Inconsistent with Its Allowance of Litigation Expenses Incurred due to the CWS v. EPA Case and Its Allowance of CWS v. EPA Litigation Expenses Does Not Demonstrate the Commission's Decision Regarding Riverkeeper Action Litigation Expenses Was Arbitrary or Capricious.**

After the filing of the Riverkeeper Action, CWS initiated a lawsuit in federal court against the Environmental Protection Agency and Town of Lexington seeking a determination it was the Town's primary obligation to ensure the I-20 facility was interconnected with the regional treatment facility ("CWS v. EPA case"). The Commission's decision to allow recovery of certain litigation expenses in connection with the CWS v. EPA case is not inconsistent with and does not conflict with the Commission's determination to deny the Riverkeeper Action litigation defense expenses and is not arbitrary or capricious. The Commission's allowance of expenses related to the CWS v. EPA case, where there was no finding of a violation of federal law, does not render

arbitrary or capricious the Commission's decision to disallow litigation defense expense associated with the Riverkeeper Action, when there was a federal district court finding that CWS violated a federal law with which CWS customers already were paying the company to comply in existing rates. The District Court found that CWS violated its NPDES permit over the preceding seventeen years by not connecting to the regional system and by violating the discharge limitations in its permit twenty-three times. *Congaree Riverkeeper*, 248 F. Supp. 3d at 755-56. The filing of the CWS v. EPA case does not serve to negate or extinguish the District Court's finding that CWS violated the CWA both by failing to connect to the regional system and because of multiple wastewater effluent limit discharge violations.

## CONCLUSION

The Commission committed no error of law in holding that CWS is not entitled to recover expenses which it incurred in defending the Riverkeeper Action. The Commission properly exercised its discretion in basing its ruling on the evidentiary record and well-established regulatory principles. Complying with state and federal laws is inherently a part of a utility providing minimally adequate service. Commission Regulations require water and sewer utilities to "comply with all laws and regulations of State and local agencies pertaining to sewerage service." S.C. Code Ann. Regs. 103-570(A), 103-770(A). Ratepayers pay CWS to provide its services in compliance with its permits and with applicable federal and state laws, including compliance with effluent limitations for discharges into the Saluda River allowed under its NPDES permit and connecting its I-20 wastewater treatment plant to the regional system as required by its permit. Consequently, the legal fees at issue were not a reasonable expense associated with the task of providing water to its customers but rather were incurred as a result of the utility's failure to comply with applicable federal and state law. Had CWS been compliant with its responsibility

to simply operate its business in compliance with the terms of its NPDES permit, there would have been no lawsuit to defend. Allowing regulated utilities to recover litigation expenses such as those at issue here disincentivizes them to operate in compliance with federal, state, and local laws.

While the Appellant has expressed disagreement with the way in which the Commission resolved the conflicting evidence regarding legal fees, its disagreement with the Commission's findings and conclusions does not rise to the level of reversible error. The substantial evidence in the record in this case fully supports the Commission's decision and reflects an appropriate use of its expertise and discretion. The Appellant has failed to present any valid grounds for reversing the Commission's decision.

The Commission is required to set forth findings of facts that are sufficiently detailed to enable a reviewing court to determine whether they are supported by the evidence and whether law has been properly applied. *Able Communications, Inc. v. South Carolina Public Service Commission* 290 S.C. 409, 351 S.E. 2d, 151 (1986). The Commission's Orders Nos. 2018-802 and 2020-57 meet these requirements in that they contain clear and concise statements of the appropriate factual findings, which are supported by the evidence and are consistent with the applicable law.

For the reasons stated herein, the Respondent ORS respectfully requests that the Court affirm Order Nos. 2018-802 and 2020-57 of the Commission.

Respectfully submitted,

By:_____*s/ Jeffrey M. Nelson*_____

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